SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Hon. Andrea Masley
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E**

INSURERS' MEMORANDUM OF LAW IN OPPOSITION TO THE NON-PARTY TEAMS' MOTION FOR PROTECTIVE ORDER

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I. PRELIMINARY STATEMENT

Beginning in August 2017, the Insurers[1] properly served subpoenas upon the 32 member teams of the National Football League ("NFL") in the state in which each is domiciled. During "meet and confer" efforts spanning well over a year-and-a-half, the teams asserted that their discovery obligations were governed by the laws of each team's home state and that they intended to "take full advantage" of those individual state's laws to oppose any motions to compel the teams to produce documents that might be filed. After reaching an impasse in those "meet and confer" efforts, the Insurers, consistent with the law and the teams' stated intent, filed motions to compel in each of the home jurisdictions in which the subpoenas were issued.

In a complete about-face, the 32 individual clubs now emerge as the "Non-Party Teams," collectively arguing that they should not be required to litigate in their home states because it would be unreasonably prejudicial or burdensome. This position is unsupportable.

Effectively, the Non-Party Teams' application to this Court constitutes 32 separate motions for protective orders filed by each of the teams. There is no legal authority upon which any Non-Party Team can rely to support its position that being required to respond to a motion to enforce a subpoena, which it has failed to comply with for well over a year, in its ***home jurisdiction*** would subject it to "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." Indeed, neither the Non-Party Teams nor the NFL Parties cite to any law supporting the proposition that this Court has authority to strip a litigant of its right to enforce a subpoena in a foreign jurisdiction where that non-party is domiciled simply because it might be inconvenient for that

[1] Unless described herein, all terms are defined in the Affidavit of Heather Simpson ("Simpson Aff.") filed herewith.

non-party's lead counsel. The teams' Motion for Protective Order and the NFL Parties' support of same is just yet another attempt to delay discovery and avoid producing ***any*** substantive documents. Simply put, the Non-Party Teams fall far short of satisfying the standard for a Protective Order under CPLR 3103.

Moreover, to the extent that the Non-Party Teams' Motion is deemed to be a renewed application for preliminary injunction under CPLR 6301, that application should also be denied as the Non-Party Teams fail to satisfy all of the required elements for such relief, as this Court already properly determined on the record on April 29, 2019. Therefore, the Insurers respectfully submit that the Non-Party Teams' Motion must be denied in its entirety.

II. FACTUAL BACKGROUND

A. THE UNDERLYING LITIGATION

This insurance coverage dispute arises from underlying actions consolidated in a multi-district litigation in the United States District Court for the Eastern District of Pennsylvania captioned In Re: National Football League Players' Concussion Injury Litigation, MDL 2323, ("MDL Action"), including claims by thousands of former NFL players and their families alleging neurological injuries and conditions allegedly resulting from concussive and subconcussive impacts sustained during those players' NFL careers.

One of the central issues in the MDL Action stems from allegations that the NFL Parties conspired with various entities to conceal allegedly known long-term health risks associated with head impacts sustained during NFL play. Among other things, plaintiffs allege that the NFL achieved this conspiracy, in part, through its creation of the Mild Traumatic Brain Injury Committee ("MTBI Committee") in 1994. The stated goal of the MTBI Committee was to study the issue of head injuries in the NFL and, according to the underlying plaintiffs, was also to "create

a body of self-serving non-clinical science on MTBI and blows to the head," provide a scientific basis for underlying test metrics used in safety-equipment research and design, and "provide non-clinical (e.g., scientific research) to interested parties making decisions with football players who could be accused of legally causing these players' chronic brain damage and/or latent brain disease(s)." See Simpson Aff., Ex. A at ¶164. The plaintiffs further alleged that the MTBI Committee served to "cast doubt on football-related causation" and "conduct bad-faith harm-reduction research" by exploring improvements to equipment and the game that the NFL and the MTBI Committee knew would not benefit its players and only create a false sense of security. Id. at ¶¶163-165. The MTBI Committee members were largely doctors affiliated with or employed by the Non-Party Teams. Id. at ¶¶171-172.

The MDL plaintiffs also alleged that the NFL Parties' "motive to ignore for decades the link between MTBIs and neurocognitive injury and to conceal and falsify research on that subject, especially during the 1994 to 2010 period that the MTBI Committee was in place, was economic" and that the NFL Parties knew that any rule changes that recognized the risks associated with MTBI would "impose an economic cost that would significantly and adversely change the profit margins enjoyed by the NFL and ***its teams***." Id. at ¶¶63-64 (emphasis added). Importantly, the NFL is an unincorporated association that acts for the benefit of its 32 independently-operated teams, which share a percentage of the league's overall revenue. See id. at ¶¶35-36 and 66.

Faced with these damning allegations, the NFL Parties entered into a settlement of the MDL Action without producing or receiving a single page of discovery or conducting a single deposition. The Settlement encompasses the following monetary components to be funded by the

NFL Parties:[2] 1) $75 million for a baseline testing program; 2) $10 million for brain injury research and education; 3) over $112 million in attorneys' fees; and 4) an uncapped monetary award fund that currently is estimated by class counsel's actuarial consultant to be in the range of $1.4 billion. In re Nat. Football League Players' Concussion Injury Litig., 307 F.R.D. 351 (E.D. Pa. 2015), amended sub nom., 2015 WL 12827803 (E.D. Pa. May 8, 2015), aff'd sub nom., 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016). The Settlement fully releases the NFL Parties and the 32 Non-Party Teams from liability arising from the class members' alleged injuries related to head trauma. As of May 20, 2019 (two years into the Settlement's 65-year term), over 20,500 former NFL players or their representatives have registered for the Settlement, and over $653 million in monetary awards have been authorized for payment.[3]

B. THE COVERAGE ACTION

1. Relevant Procedural Background

The insurance coverage lawsuit between the Insurers and the NFL Parties was filed in this Court on August 13, 2012 ("Coverage Action"). After extensive meet and confer efforts between the parties, the Court entered a Protective Order that satisfied the NFL Parties' confidentiality concerns and is more restrictive than the New York City Bar Association template incorporated into the Commercial Division rules. Simpson Aff., Ex. B. Although the parties each produced documents relating to insurance issues at that time, the Insurers agreed, at the NFL Parties' request,

[2] The Settlement does not allocate liability between the two NFL Parties; it makes each jointly and severally liable for all Settlement obligations, including the uncapped Monetary Award Fund.

[3] NFL Concussion Settlement Program Stats., https://www.nflconcussionsettlement.com/Reports_Statistics.aspx (last modified May 20, 2019).

to stand down on further discovery pending the NFL Parties' efforts to resolve the MDL Action. The parties did not return to this Court until two-and-a-half years later (November 2015), after the Settlement received final court approval. At that time, this Court determined that discovery should re-commence, and subsequently denied the NFL Parties' motion to stay in November 2016. NYSCEF Doc. 277. Thus, more than four years into this case, the parties finally began the discovery process in earnest.

In early 2017, written discovery demands were exchanged, to which the NFL Parties provided limited responses and, consistent with their strategy of delay, they produced hundreds of thousands of largely irrelevant pages of discovery. The paper discovery process is ongoing, as numerous discovery disputes between the parties remain. Some of those disputes have been the subject of motion practice before a court-approved Special Referee. Parts of the Special Referee's February 26, 2019 opinion are the subject of pending applications for review to this Court to be heard on June 14, 2019.

2. The Insurers Seek Documents from the Non-Party Teams

Having had their discovery demands from the NFL Parties largely refused, between August 2017 and August 2018, the Insurers served Subpoenas on each of the 32 Non-Party Teams in their home jurisdictions ("Subpoenas"). Simpson Aff., Ex. C. The Subpoenas generally seek documents and communications relating to: (i) the Non-Party Teams' knowledge of the potential long-term effects/risks of head trauma sustained in football and/or the potential relationship between head trauma and subsequent alleged brain injury; (ii) communications between the Non-Party Teams and the NFL and the MTBI Committee about the research conducted by them regarding the potential long-term effects or risks of head trauma sustained in football and/or the potential relationship between head trauma and subsequent alleged brain injury; (iii) any databases or lists

maintained by the Non-Party Teams about their former players who may have sustained brain injuries (e.g., weekly injury reports); (iv) workers' compensation claims for alleged brain injuries made by their players; (v) the Non-Party Teams' interactions with any NFL player regarding alleged brain injury; (vi) the Non-Party Teams' concussion management protocols; (vii) evidence of costs incurred or to be incurred by the Non-Party Teams in connection with the MDL Action or Settlement; (viii) the corporate relationship between the Non-Party Teams and the NFL, including any indemnity agreements between them as suggested in Section 3.11(c) of the NFL's Constitution and Bylaws; and (ix) documentation retention policies.

The requested documents are highly relevant to a number of issues in the Coverage Action, including whether the NFL (and/or its Non-Party Teams) had knowledge of the long-term risks of head trauma in football, whether it expected the injuries to occur, whether injuries took place during the Insurers' respective policy periods, whether the Settlement was reasonable, and how the Settlement is funded among the NFL, NFLP and/or Non-Party Teams (who were released by the Settlement) and many others.

Between September 2017 and June 2018, the Non-Party Teams, through their shared counsel Proskauer Rose LLP, provided non-substantive responses and objections to the Subpoenas. Simpson Aff., Ex. D. During that time, and continuing until Fall 2018, counsel for the Insurers and the Non-Party Teams engaged in numerous email and telephone communications, including "meet and confer" teleconferences on January 18, 2018, March 9, 2018, August 30, 2018, and October 24, 2018. Simpson Aff. at ¶¶8-9. These teleconferences consisted of counsel for the Non-Party Teams referring to various objections to the Subpoenas, which were disputed by the Insurers, while at the same time continuing to represent that each of the Non-Party Teams were working to collect documents responsive to the individual Subpoena that each had received.

Simpson Aff. at ¶9.

The Non-Party Teams refused, however, to describe what efforts, if any, had been undertaken to collect documents responsive to any Subpoena or provide any information regarding the timing or scope of any anticipated production. During these teleconferences, the Non-Party Teams' primary objection to the Subpoenas was that they should not be obligated to provide responsive documents until "first party discovery" from the NFL Parties is completed. Id.

On September 24, 2018, over a year after the first wave of Subpoenas had been served, the Insurers wrote to counsel for the Non-Party Teams formally expressing their disappointment that none of the Non-Party Teams had produced a single document. Simpson Aff., Ex. E. The Insurers explained that, even if the NFL Parties have produced, or may in the future produce, documents in the Coverage Action that overlap with some of the documents in the possession of the Non-Party Teams, the law (in any jurisdiction) does not absolve the Non-Party Teams of their own discovery obligations in response to a valid subpoena. Additionally, the Insurers disputed the Non-Party Teams' attempt to limit their production obligations to only those materials in their possession that were transmitted or copied to the NFL (i.e., documents also in the possession of the NFL) on the basis that such documents are the only ones relevant to the Coverage Action. Certainly, the mere fact that a document in the possession of one of the Non-Party Teams has not been transmitted or communicated to the NFL does not render it irrelevant or undiscoverable. Id.

Nonetheless, to assist the Non-Party Teams in responding to the Subpoenas, and at the Non-Party Teams' request, the Insurers allowed the Non-Party Teams additional time to produce documents, prioritized a "subset" of their document requests, and provided "search terms" they

could use to more efficiently conduct a search of their electronically-stored information.[4] Id.

By letter dated October 11, 2018, the Non-Party Teams rejected the Insurers' proposal that they first search their files for the list of "priority" requests (which the Non-Party Teams had requested) using the proposed search terms. Simpson Aff., Ex. F. In addition, ***the Non-Party Teams asserted their right to avail themselves of the protections of the discovery rules and laws of the varying states where each Team is located and stated that if the Insurers intended to seek judicial assistance to enforce the Subpoenas they would need to do so in each of the 32 relevant jurisdictions.*** Id.

Throughout the meet and confer process, counsel for the Non-Party Teams also referred generally to potential privilege issues with respect to documents responsive to the Subpoenas, including a vague contention that, upon collection of responsive documents, the NFL would have the right to conduct an additional review to evaluate potential privileges ***it*** might assert over such documents. Simpson Aff. at ¶10. The Non-Party Teams provided no further confirmation as to whether they were withholding documents on the basis of a privilege claimed by the NFL.

During an October 24, 2018 "meet and confer" teleconference, counsel for the Insurers and Non-Party Teams acknowledged that an impasse existed with respect to the Insurers' requests and the Non-Party Teams' objections. Simpson Aff. at ¶11. At the conclusion of the call, the Insurers

[4] The Non-Party Teams could have saved the Insurers and this Court a great deal of time if they had simply agreed to use the search terms proposed by the Insurers back in September 2018, or at least some subset of them. Instead, the Non-Party Teams forced the Insurers to commence motion practice and then, at the recent hearing before this Court, agreed to use the majority of the search terms.

demanded that the Non-Party Teams produce all non-privileged documents in their possession, custody, or control within 30 days. Id. The Insurers sent a follow-up letter on November 14, 2018, confirming that they still had not received a single document from any one of the Non-Party Teams and reiterating their demand that each of the Non-Party Teams produce all responsive non-privileged documents by November 30, 2018. Simpson Aff., Ex. G.

On November 30, 2018, 14 of the 32 Non-Party Teams produced a combined total of 189 documents to the Insurers related to only one category of requests under the Subpoenas (insurance policies); the remaining 18 Teams produced ***nothing***. The same day, 15 of the 32 Non-Party Teams, including some that produced documents and others that had not, provided a joint privilege log indicating that a combined total of 24 allegedly privileged emails and documents regarding "document and data management, retention and preservation requirements" were withheld from production. Simpson Aff., Ex. H.

To date, the Non-Party Teams' collective production in response to Subpoenas served on them, in most cases well over a year ago, consisted, in all, of less than 500 pages. No privilege log specifically identifies documents being withheld by the Non-Party Teams beyond the 24 total allegedly privileged documents regarding data preservation withheld by 15 Non-Party Teams.

Despite the Insurers' best efforts to avoid court involvement, the Non-Party Teams effectively thumbed their nose at the Subpoena process. As of April 29, 2019, the Insurers have been required, at their own expense, to file motions to compel compliance with the Subpoenas 22 of the 32 Non-Party Teams ("Motions to Compel"). Before the Insurers could complete filing Motions to Compel against the remaining Non-Party Teams, on April 26, 2019, the Non-Party Teams filed an Order to Show Cause before this Court, seeking a protective order with a temporary restraining order: (1) directing the Insurers to withdraw or stay all Motions to Compel; (2) directing

the Insurers not to commence any further proceedings against the Non-Party Teams; and (3) consolidating all such proceedings before this New York Court.

The parties and Non-Party Teams appeared for a hearing before this Court on April 29, 2019. That day, the Court entered an Order ("Order"), on consent of the parties, compelling the Non-Party Teams to run certain search terms and produce all responsive, non-privileged documents to the Insurers by June 1, 2019, in exchange for the Insurers' voluntary agreement to stay all Motions to Compel and temporarily refrain from initiating further proceedings. Simpson Aff., Ex. I. Notwithstanding the parties' agreement, the Court determined on the record that the Non-Party Teams failed to establish the TRO aspect of their application. Simpson Aff., Ex. J at 27:2-10 ("I don't think I have burden and harassment in here...I don't think you have what you need to get a TRO. That is for sure."); 28-14-19; 39:17-25.

III. LEGAL ARGUMENT

A. THE NON-PARTY TEAMS FAIL TO SATISFY THE STANDARDS FOR A PROTECTIVE ORDER UNDER CPLR 3103(a)

In an effort to hinder the Insurers' rights to enforce Subpoenas against them, the Non-Party Teams seek a Protective Order pursuant to CPLR 3103(a) to enjoin the Insurers from availing themselves of the court in each Team's home jurisdiction and to consolidate all future disputes regarding these Subpoenas before this Court. A Protective Order, pursuant to CPLR 3103(a), may be issued to regulate the use of disclosure devices and "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Westchester Rockland Newspapers, Inc. v. Marbach, 413 N.Y.S.2d 411, 413 (1979). The Non-Party Teams fail to satisfy the standard for such a protective order because no Non-Party Team can demonstrate ***any*** undue burden or prejudice that would befall it if required to address disputes in its home jurisdiction. Also, they cite no case, and none exists, holding that a protective order is appropriate

where a multi-billion-dollar corporation (like each of the Teams) has been served with a duly issued subpoena, simply because that corporation would prefer that disputes over its obligation to respond be heard in this Court, rather than its own home court which issued the subpoena.

1. There is No Undue Burden or Prejudice to the Non-Party Teams

The present Motion is filed under the guise that, if the protections sought are not granted, then the "Non-Party Teams" will, collectively, suffer the type of burden and prejudice contemplated by CPLR 3103(a). Importantly, however, there is no such entity as "the Non-Party Teams." The 32 Non-Party Teams are in fact completely independent corporate entities.[5] At their insistence, each has been served with an independent subpoena by the Insurers. There is no basis whatsoever upon which any Team can argue that merely being required to respond to a motion in its home court to enforce a document subpoena that it has effectively ignored for more than a year would subject it to "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." No Team will be forced to respond to multiple, similar motions in different jurisdictions or be exposed to any purported inconsistent ruling. And the fact that the 32 Non-Party Teams each chose to be represented by the same law firm, and that firm may be tasked with responding to multiple similar motions, is no basis for granting each Team relief under CPLR

[5] See Am. Needle, Inc. v. NFL, 560 U.S. 183, 198 (2010) ("Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests…are not necessarily aligned…. Common interests in the NFL brand *partially* unit[e] the economic interests of the parent firms, but the teams still have distinct, potentially competing interests.").

3103(a).[6]

Indeed, the position in which each of the Non-Party Teams now finds itself is entirely of its own making. After the Insurers attempted to meet and confer with them in good faith (for more than a year and a half), each of the Teams made it clear that, if the Insurers felt compelled to seek judicial assistance in enforcing any of the 32 Subpoenas (which they have now been forced to do), they would be required (by the Non-Party Teams) to do so in each of their home jurisdictions, and in accordance with each jurisdictions' laws. Specifically, when the Insurers wrote to the Non-Party Teams' joint counsel about various issues which they believed in good faith could be addressed collectively (at that time), first among the Non-Party Teams' numerous objections to those efforts was the following:

> It is important to note that the 32 Non-Member Clubs reside in 22 different states, each with their own discovery rules and laws that are individually applicable to the Subpoenas. The manner in which certain states view non-party discovery varies widely and the Non-Party Clubs intend to take full advantage of those laws in the event they are subject to motion practice.

Simpson Aff., Ex. F at 3.

Now that their refusal to comply with the Subpoenas (and delay production of documents) has necessitated the very motion practice they invited, the Non-Party Teams would have this Court believe that availing themselves of the jurisdictions that they insisted were appropriate would somehow constitute "unreasonable annoyance, expense, embarrassment, disadvantage, or prejudice." Clearly, it is not the Insurers who are engaging in gamesmanship; it is the Non-Party Teams.

[6] Of course, Proskauer Rose possesses the resources to handle the motions. In addition, the Insurers are aware that the Non-Party Teams have local counsel engaged to assist in responding to the motions to compel in the foreign jurisdictions.

This Court recently entered an Order, on consent, compelling the Non-Party Teams to produce documents responsive to the Subpoenas pursuant to certain search terms. However, subject to the Insurers' assessment of the completeness of those productions, the potential for further proceedings to enforce the Subpoenas in the various foreign jurisdictions remains, and, unfortunately, may be necessary considering the history of unsuccessful negotiations with the Non-Party Teams (and the NFL Parties) regarding the scope of discovery. The only time the Insurers gained any meaningful traction from the Non-Party Teams in responding to the Subpoenas was by filing the Motions to Compel. The Insurers anticipate multiple discovery disputes of varying natures with these 32 different entities. The Insurers continue to believe the most appropriate forum for litigating any discovery dispute arising from any subpoena is the state in which that subpoena was issued, whose laws are applicable to the scope of discovery. That is the Insurers' right.

The Non-Party Teams contend that because the Insurers seek the same general categories of documents from each of them (resulting in virtually the same objections), all of the Insurers' separate Motions to Compel should be adjudicated before this Court to avoid "inconsistent rulings." NYSCEF Doc. 546 at 9-10. The Non-Party Teams do not provide any explanation as to why separate potential rulings are problematic for them or why it is (suddenly) unwise for the various foreign jurisdictions to enforce the Subpoenas they issued. This argument is a red herring; the "Non-Party Teams" is not a single entity, but actually 32 separate corporations residing in 22 different states and subject to separate state laws. As such, no Non-Party Team will even potentially be exposed to any "inconsistent ruling." It is of no consequence that a Massachusetts court may find the scope of the New England Patriots' obligations with respect to the subpoena it received is different from what a Washington court may find to be appropriate for the Seattle Seahawks. ***No team*** will ever be required to produce anything beyond the scope of its individual

obligations under the particular law applicable to it. Moreover, each is free to provide its home jurisdiction with rulings from other enforcement proceedings or this Coverage Action to show that those results should or should not apply there.

Furthermore, in light of the discovery received to date, pursuing the Non-Party Teams in their home jurisdictions is the Insurers' preference. Of course, counsel for the Insurers must "abide by [our] client[s]' decisions concerning the objectives of representation." N.Y. Rules of Professional Conduct, Rule 1.2(a). Respectfully, it is not up to this Court (and certainly not up to the Non-Party Teams or the NFL Parties) to direct the Insurers' approach to litigation, especially where the Insurers' approach is soundly in their best interest. See Matter of James HH, 234 A.D.2d 783, 785 (3d Dep't 1996) (explaining that it is not the role of the court to second-guess an attorney's tactics or strategy).

The Non-Party Teams' essential argument is a plea to make the process of responding to the Insurers' motions as simplified and convenient as possible for ***their attorneys***. This is not a valid reason to grant the Non-Party Teams' motion for Protective Order, particularly where the Non-Party Teams forced the Insurers to pursue compliance through numerous separate proceedings that the Non-Party Teams supposedly wanted in the first place. They cannot have it both ways. They insisted on separate proceedings, and the Insurers gave them what they wanted. Perhaps the Non-Party Teams' unbelievable concerns about having to litigate future disputes in their home states will be mooted if all of the documents that the Insurers seek (using all of their search terms) are produced by each Team in response to this Court's Order on June 1, 2019. If not, seeking intervention from a multi-billion-dollar corporation's home court to enforce a duly-issued document subpoena issued by that court certainly will not constitute "unreasonable annoyance, expense, embarrassment, disadvantage, or prejudice." Accordingly, this Motion must be denied.

2. The Case Law Relied Upon by the Non-Party Teams and the NFL Parties is Not Controlling

Having no precedential support for the specific relief they seek, the Non-Party Teams rely upon legally and factually distinguishable case law that is uninstructive here. The Non-Party Teams contend that the relief they are seeking is appropriate because New York ***federal courts*** have required parties to litigate discovery disputes in the forum where the main action is located. NYSCEF Doc. 546 at 6 (citing four ***federal*** cases where this occurred). This happens in ***federal courts*** because, obviously, those courts are governed by a single set of rules, the Federal Rules of Civil Procedure, with Rule 45(f) providing an explicit mechanism to transfer motions for compliance with subpoenas to the main federal action.

There is no such common legal regime shared among the state courts. And, certainly no such rule exists under New York's CPLR that requires, for example, the North Carolina Superior Court in Mecklenburg County to transfer the Insurers' Motion to Compel the Carolina Panthers' compliance with a subpoena issued by that county's offices to the New York Commercial Division. Likewise, no rule exists under New York's CPLR that requires or even allows this Court to strip any litigant of its right to enforce a duly authorized subpoena in a foreign jurisdiction where that non-party is domiciled just because it might be inconvenient for that non-party's lead counsel located elsewhere. Respectfully, without any rules to this effect (and neither the NFL nor the Non-Party Teams point to any), this Court lacks authority to restrict the Insurers from seeking to enforce subpoenas issued and governed by the laws of foreign state courts. Moreover, this Court lacks authority to strip each foreign court that issued a subpoena in its own jurisdiction to determine the discovery obligations owed by a major corporation domiciled in its state.

Additionally, the Non-Party Teams erroneously cite to a series of First Department decisions that enjoined parties from initiating parallel lawsuits to prevent forum-shopping or

otherwise duplicative litigation ***as between the same plaintiff and defendant who were already proceeding in New York state court***. Those cases have no relevance here, where the Insurers simply wish to retain the ability to obtain court orders against ***foreign non-parties***, if necessary, to ensure their compliance with separate subpoenas duly authorized by those foreign jurisdictions. This is not forum-shopping; rather, it is a run-of-the-mill subpoena enforcement practice that just happens to involve 32 multi-billion-dollar corporations who desire special treatment.

Recognizing the absurd inapplicability of the case law cited by the Non-Party Teams in support of their motion, the Non-Party Teams' mothership (i.e., the NFL Parties) abandoned this line of reasoning in separate briefing in support of this Motion. The NFL Parties instead rely on cases articulating the broad scope of this Court's power to determine the scope of discovery (which although not disputed, is not unlimited), and a series of non-binding trial court decisions that contain iterations of the phrase: "It is appropriate for the…court which has the underlying case, and is therefore in a better position to determine the appropriate scope of disclosure, to make the threshold determination as to whether to permit the discovery."[7]

These cases are inapposite. Each involved situations where New York (the ***foreign jurisdiction***) was asked to enforce a subpoena that the recipient contended was procedurally defective regarding a case pending in another state. Hence, exactly what the Insurers contend is appropriate here.

[7] In re Kerr, 16 Misc. 3d 1028, 1032 (Sup. Ct., N.Y. Cty. 2007); In re Welch, 183 Misc. 2d 890, 891 (Sup. Ct., N.Y. Cty. 2000); In re Land, 22 Misc. 3d 1117(A), No. 100796/08, 2009 WL 241728, at *5 (Sup. Ct., N.Y. Cty. 2009).

In In re Kerr, the defendant objected to an application, made in California, for a commission to issue a subpoena to a non-party in New York. The California court only issued a limited commission, subject to its right to later determine whether the information in question was properly discoverable upon review of any New York court ruling. When the enforceability of the subpoena became subject to motion practice in New York (as each of the Subpoenas at issue here should be challenged in the court that issued it) the New York court ruled that the California court should first substantively decide whether the scope of the discovery was proper (i.e., via the issuance of a non-restrictive commission). Likewise, in In re Welch, the propounder of the subpoena (from a California action) sought enforcement of a foreign subpoena in New York without having first obtained a proper commission from the California court, and the New York court ruled that the California court must first determine that the discovery is appropriate (i.e., issue a commission) before it would compel enforcement. And in In re Land, the recipient of the subpoena unsuccessfully sought to have the New York court effectively overrule a Texas court that had already determined the discovery was appropriate.

Again, each of these cases involved a dispute in a foreign jurisdiction (New York) over the enforceability of a subpoena connected to a case in another state. If the Non-Party Teams (or the NFL Parties) wish to dispute the enforceability of the Subpoenas, they will be able to do so; ***in the appropriate foreign jurisdictions***, just like in the cases they cite.

While it remains to be seen if objections to the Subpoenas will be successful (if further motion practice becomes necessary), those objections will fail if asserted on the procedural basis that the Subpoenas are not duly issued. The legitimacy of the Subpoenas has never been challenged. Indeed, in forcing the Insurers to apply to this Court for commissions, the NFL Parties could have, as in In Re Kerr, objected to the issuance of commissions for Subpoenas served upon

the Florida-, Texas-, Massachusetts-, and Missouri-based Teams, but they did not. It is beyond dispute that the Non-Party Teams are relevant third-parties to this action and each has admitted to possessing non-privileged documents responsive to the Subpoenas.

In any event, there is no basis on which any Non-Party Team can contend that being subject to a motion to enforce a subpoena issued by its home court in its home court (if such becomes necessary) will cause "unreasonable annoyance, expense, embarrassment, disadvantage, or prejudice" such that a Protective Order pursuant to CPLR 3103(a) is appropriate. There is no case, and the Non-Party Teams (and the NFL Parties) cite to none, in which any New York court has ever enjoined a party from seeking enforcement of a properly issued subpoena in the foreign jurisdiction that issued it just because the subpoena recipient would prefer to have disputes regarding it adjudicated, collectively, with other non-parties that received a similar subpoena in New York. This Motion must be denied.

B. PRELIMINARY INJUNCTIVE RELIEF UNDER CPLR 6301 IS INAPPROPRIATE

The Non-Party Teams fail to satisfy the standard for a protective order. To the extent they are alternatively seeking extraordinary injunctive relief under CPLR 6301, such request fails as well. To warrant such relief, the Non-Party Teams are required to demonstrate, by clear and convincing evidence, ***all three*** elements necessary for a preliminary injunction: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; (3) a balance of equities tipping in the moving party's favor." Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep't 2001) ("Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers.").

The Non-Party Teams fail to demonstrate each of these elements. Indeed, in the context of the Non-Party Teams' TRO application, this Court already ruled that they have failed to establish them. Simpson Aff., Ex. J at 27:2-10 ("I don't think I have burden and harassment in here...I don't think you have what you need to get a TRO. That is for sure."); 39:17-25. Therefore, to the extent that the Non-Party Teams' are seeking preliminary injunctive relief, that should also be denied.

1. The Non-Party Teams will not Sustain Immediate and Irreparable Harm

It is well-settled that "***irreparable harm***," rather than mere prejudice or inconvenience, is the threshold requirement for preliminary injunctive relief and, absent a showing that plaintiff will ***immediately*** suffer such irreparable harm, a preliminary injunction cannot be granted. See Haulage Enters. Corp. v. Hempstead Res. Recovery Corp., 426 N.Y.S.2d 52, 54 (2d Dep't 1980) (reversing the granting of preliminary injunction where movant failed to establish irreparable injury); Chicago Research & Trading v. N.Y. Futures Exch., Inc., 446 N.Y.S.2d 280, 282 (1st Dep't 1982) ("Injunctive relief…afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury.").

There is no evidence of any harm whatsoever, let alone any ***irreparable*** harm, that will come to the individual Non-Party Teams if the pending or future Motions to Compel in their home jurisdictions (where ***they*** demanded the Insurers pursue them) are not enjoined and consolidated before this Court. The Non-Party Teams contend that they (collectively) are facing immediate and irreparable harm due to "having to litigate identical discovery issues in 32 separate court proceedings in 22 different states." NYSCEF Doc. 546 at 7. Importantly, as noted, there is no entity called the "Non-Party Teams" that could even sustain such alleged harm.

No team that is now (or could be) the subject of motion practice for its failure to properly comply with the subpoena served upon it will have to litigate anything in any court other than its

home court. There is no evidence that the disposition of one motion to compel a team to comply with a subpoena would result in any harm to itself or another team. Their application is not even supported by a single affidavit from an employee of any one of the 32 Non-Party Teams purporting to describe any immediate or irreparable harm, as they must. See CPLR 6312(a) ("On a motion for a preliminary injunction ***the plaintiff***'–not its counsel–"***shall show by affidavit***" that it has demanded judgment restraining the defendant from committing or continuing acts which "would produce ***injury to the plaintiff***") (emphasis added). Rather, they rely upon an affidavit of counsel from Proskauer Rose that merely complains about the inconvenience to that firm in having to defend its 32 separate clients in the jurisdictions where they are domiciled. The Non-Party Teams' choice of counsel cannot constitute "immediate and irreparable harm" to any one (or all) of the Non-Party Teams and should not prejudice the Insurers' rights to enforce the Subpoenas in the jurisdictions that issued them.

It defies logic to contend, for example, that the Philadelphia Eagles would be "irreparably harmed" by having to respond to a motion to compel a subpoena filed against them in Philadelphia because the Miami Dolphins must separately respond to a motion to compel in Florida. Each Non-Party Team must respond to ***only one*** motion in its home jurisdiction where the relevant Subpoena was issued. ***No harm,*** let alone irreparable harm, will result from ***any team*** having to face a single motion to compel in its home state.

Accordingly, as this Court already ruled, the Non-Party Teams fail to satisfy the threshold requirement of proving irreparable harm, which is dispositive of this analysis.

2. The Non-Party Teams Are Not Likely to Succeed on the Merits

Even assuming, *arguendo*, that the Non-Party Teams could establish some type of irreparable harm (which they cannot), they would also need to establish that they are likely to convince all of the jurisdictions hearing the Insurers' Motions to Compel that their objections to

the Subpoenas are sufficient to justify not producing even a single substantive document for well over a year.

No court could conceivably be convinced of this. Thirty-two Subpoenas and 21 months later, the Non-Party Teams have failed to produce ***any*** meaningful documents. The Insurers have received just 189 insurance policy documents from 14 Non-Party Teams, while the remaining 18 Teams produced ***nothing***. This is everything, even after indulging the Non-Party Teams in months of ongoing "meet and confer" efforts and providing the same search terms back in September 2018 that they have only now agreed to utilize after this Court's intervention. The Insurers cannot imagine another court learning of this and denying a motion to compel the Non-Party Teams to produce, at least, non-privileged materials responsive to the Subpoenas.[8]

As explained by counsel for the Insurers during oral argument, *at this initial stage*, the Insurers' motions to compel requested only that the Non-Party Teams produce the documents over which they do not claim any privilege. Ex. J at 16:1-2. This remains true, subject to the Non-Party Teams identifying assertions of privilege on a log so potential disputes can be identified. The Non-Party Teams cannot, however, simply refuse to produce all potentially responsive materials just because some fraction of responsive materials may be privileged. Accordingly, the Non-Party Teams are not likely to succeed on the merits of their objections to the Subpoenas.

[8] Notably, the Non-Party Teams object to producing materials that may be the subject of the NFL Parties' "defense file." As the NFL Parties acknowledge in their submission, the Teams were not defendants in the MDL Action. Therefore, it is unclear how the Non-Party Teams can assert any concerns regarding their own "defense file" and it begs the question of whether the Teams had shared access to the NFL Parties' "defense file." If they did, then any privilege asserted over those files would be destroyed.

3. The Equities Weigh in Favor of the Insurers

The Non-Party Teams also fail to prove that any equities weigh in their favor. The Insurers have been incredibly patient with the Non-Party Teams in responding to the Subpoenas, giving each extra time to provide their initial responses and agreeing to participate in extensive "meet and confer" efforts over the last year-and-a-half. Since the first Subpoenas were served in August 2017, the Insurers have received a measly 189 insurance documents from less than half of the Non-Party Teams, while the remainder produced ***nothing*** and represented that nothing was forthcoming until this Court intervened.

Despite the Non-Party Teams' sudden desire to resolve all of the disputes arising from the Subpoenas and willingness to conduct some of the searches that the Insurers asked them to back in September 2018, it is clear that the Non-Party Teams never intended to make any serious effort to respond to the Subpoenas until the Insurers were forced to pursue necessary court action at significant costs to themselves. Now that the Insurers have taken those actions at their expense, the Non-Party Teams cannot be allowed to retread old ground that should have been the subject of "meet and confer" efforts months ago and avoid incurring those same costs by consolidating all matters regarding the Subpoenas before this Court.

This plea is simply too little, too late. The Insurers have long been trying to comply with the discovery deadlines set by this Court, but the Non-Party Teams and NFL Parties are willing this discovery process to halt at every possible chance. The year-plus-long failure to produce a single responsive document other than insurance policies is just the most recent iteration of this pervasive delay tactic. The fact is that the Insurers are already situated to proceed with their Motions (if necessary) in the foreign jurisdictions, and, therefore, the equities rest in favor of the Insurers.

IV. CONCLUSION

Based on the foregoing, the Non-Party Teams' Motion for Protective Order under CPLR 3103 must be denied, as they have failed to establish that responding to separate motions to compel compliance with separate subpoenas served upon them in their home jurisdictions would subject them (collectively or individually) to "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." To the extent that the Non-Party Teams seek preliminary injunctive relief under CPLR 6301, such relief should also be denied.

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